IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 23 OF 2023

REPUBLIC.....PROSECUTOR

VERSUS

ZAHAQ RASHID NGAI@MTU MZIMA.....1st ACCUSED

CHANDE RASHID NJAWI.....2nd ACCUSED

RASHIDI GAIBON@ SWALEHE.....3rd ACCUSED

JIHADI GAIBON @SWALEHE.....4th ACCUSED

JUDGMENT

Date of last Order: *14/05/2024*
Date of Judgment: *04/06/2024*

According to the investigator of this case, between 2013 and 2015 there were terrorism-related incidents happened in our country. Acts of invading police stations and banks where police officers and civilians were murdered, money was stolen, and firearms were taken. To were the signs of terrorist acts.

He mentioned that in the Arusha region, a home-made bomb was thrown at the Chadema party meeting and at Olasiti Catholic Church,

where people were killed and injured. Also, at Vama restaurant, the bomb was thrown, and many people were injured.

In the Dar es Salaam region, the Staki Shari police station was invaded, whereby police officers were murdered and firearms were taken.

Also, at Mbande Chamazi, the Bank was invaded, the police officers were murdered, and the guns were taken.

In the Coastal Region, at Pugu area, a police officer amputated his hand and his gun was taken. At Kongowe area at the police barrier, the police officers were invaded and killed, and their weapons were taken.

The Bank at Mkuranga was invaded, police officers were killed, and the guns and money were stolen.

Further, Kimanzichana Police Station was invaded, the police officers who were at the Charge Room Office (CRO) were murdered, and guns were stolen.

In the Geita Region, at Ushirombo area, a pregnant female police officer was invaded and decapitated.

Those incidents triggered the appointment of a special task force made by officers from various departments, including the police force. The

task force aimed to collect intelligence information from multiple sources, analyse the information received, investigate, and search for the culprits.

The intelligence information was received from various sources, including relatives, friends, and close people to the culprits. The suspects also voluntarily provided information when arrested.

Other sources were religious institutions, non-governmental organisations, social media and foreign countries.

The work of the task force led to the surrender of the 1st accused person and the arrest of the 2nd, 3rd, and 4th accused persons at different times and places who were later indicted at the Court.

According to the information and facts of the case, the 1st accused person is Zahaq Rashid Ngai@ Mtu mzima, a businessman, Muslim, Muha by tribe, and resident of Kijichi and Tuangoma, both in Dar es Salaam.

The 2nd accused person is Chande Rashid Njawi, a businessman, Muslim, Ngindo by tribe, and a resident of Tegeta in Dar es Salaam.

The 3rd accused person is Omary Rashid Mmigwa, Muslim, Ngindo by tribe and a resident of Likawage Village in Lindi and

The 4th accused person is Jihad Gaibon Swaleh, a businessman, Muslim, Zaramo by tribe and a resident of Tegeta in Dar es Salaam.

Both four accused persons are now arraigned together and jointly on four terrorism-related counts as follows;

In the 1st count of Conspiracy to Commit Terrorist Acts, Contrary to Section 4 (1), (3) (i) (i) and 27(c) of **the Prevention of Terrorism Act,** No. 21 of 2002. It was alleged that both accused persons, on diverse dates between 2 January 2014 and 14 August 2015, at various places between Likawage village within Kilwa District in Lindi Region, Tegeta Mivumoni area within Kinondoni District in Dar es Salaam Region and Mbagala Mbande area within Temeke District in Dar es Salaam Region did conspire to commit an offence to wit: Establishing an Islamic State within the United Republic, act which intended to seriously destabilise the fundamental political constitutional, economic and social structures of United Republic of Tanzania.

The 2nd count was Collection of Property for Commission of Terrorist Acts, Contrary to sections 4 (1), (3) (i) (i) and 14(a) of the **Prevention of Terrorist Act, No. 21 of 2002,** and it was alleged that both accused persons, on 14 August 2015, at various places between Likawage village within Kilwa District in Lindi Region and Tegeta Mivumoni area, Kinondoni District within the City and Region of Dar es Salaam, one firearm Sub Machine Gun AK 47 with serial No. NY 7120, intending to be

used to facilitate the commission of a terrorist act, to wit, establishing an Islamic state, an act which creates a serious risk to the safety to the public.

In the 3rd Count of Agreeing to participate in the Commission of Terrorist Act, Contrary to section 4 (1), (3) (i) (i) and 21(b) of the **Prevention of Terrorism Act, No. 21 of 2002.** The prosecution alleged that both accused persons, on diverse dates and places, between 2 January 2014 and 14 August 2015 at Likawage village within Kilwa District in Lindi Region and Tegeta Mivumoni area within Kinondoni District in Dar es Salaam Region, knowingly did agree to participate in the commission of a terrorist acts to wit; waging JIHAD WAR within the United Republic of Tanzania for purposes of establishing an Islamic State within the United Republic of Tanzania, act which creates a serious risk to the safety of the section of the public within the United Republic of Tanzania; and

In the last count of Possession of Property for Commission of Terrorist Acts, Contrary to sections 4 (1), (3) (i) (i) and 15(b) **of the Prevention of Terrorist Act, No. 21 of 2002**.

It was alleged that both accused persons, on 14th August 2015 at Likawage village within Kilwa District in Lindi Region, were found in possession of properties, to wit, one firearm made Sub Machine Gun AK 47

with Serial No. NY 7120, knowing that the said properties will be used in whole for purposes of facilitating the commission of terrorist acts, to wit, waging JIHAD WAR within the United Republic of Tanzania for purposes of establishing an Islamic State within the United Republic of Tanzania, an act which creates a serious risk to the safety of the section of the public within the United Republic of Tanzania

The accused persons pleaded not guilty to both counts.

During the Preliminary Hearing conducted under **Section 192 of the Criminal Procedure Act, Cap. 20 R.E. 2022**, the 1st accused admitted only his name and personal particulars, and the 2nd accused person admitted his name and that he was arrested at Tegeta Dar es Salaam. On his part, the 3rd accused person admitted his name tribe and that he was arrested at Kilwa, while the 4th accused person admitted his name and was arrested at Istanbul Airport in Turkey.

The Republic thus brought **eight witnesses** to prove its case. To conceal their identities. Those eight witnesses were identified as follows: **PW1** was identified as witness **P3**, a ballistic analyst; **PW2** was identified as **P4**, an Amory/ exhibit keeper; **PW3** was identified as **P5**, a police officer; and **PW4** was identified as **P**, a police officer who conducted search and recorded the cautioned statement of the third accused person;

PW5 was identified as **P7**, an independent witness as the search; **PW6** was identified as P8, investigator of the case; **PW7** was identified as **P2**, a police officer who recorded the cautioned statement of the first accused person; and **PW8** was identified as **P1**, a police officer who recorded the cautioned statement of the second accused person.

Besides, they tendered seven (07) exhibits, which were admitted as follows: Exhibit P1, A gun; SMG AK47 with serial number NY. 7120; Exhibit P2, Ballistic Expert Report; Exhibit P3, Exhibit Register; Exhibit P4, Certificate of Seizure; Exhibit P5, cautioned statement of the 3rd accused person; Exhibit P6, cautioned statement of the 1st accused person; Exhibit P7, cautioned statement of the 2nd accused person.

The Republic was represented by Mr. Waziri Magumbo, learned Senior State Attorney, and Mr. Faraji Ngukah, Mr. Nestory Mwenda, and Ms. Godiliver Shio, learned state attorneys.

On the other hand, Mr. Pius Kipengele, learned counsel represented the 1st accused person, Mr. Muhimbi Juma learned counsel represented the 2nd accused person, Ms. Neema Saruni and Ms. Atuganile Kamalika, both learned counsels represented the 3rd accused person and Mr. Juma Hitu,

also a learned counsel represented the 4th accused person.

Briefly, the prosecution evidence was as follows: **PW6 (P8),** the investigator of the case, testified that on 22 July 2015, between 07:00 and 07:30 hours, he was at the DCI office and informed that the 1st accused person, among the suspects they were looking for, had surrendered at the Central Police Station; therefore, he went to that police station. He was informed that he surrendered around 07:00 and 07:30 hours.

He interviewed him orally, and the 1st accused person revealed to him that he was the leader (Amir) in terrorist activities after succeeding Jihadi Gaibon at the meeting conducted in Mbande area and that Gaibaon had escaped to Syria through Turkey.

He also confessed that he participated in the meetings where they planned to overthrow the Government of the United Republic of Tanzania and install the Islamic State, invade police stations and steal firearms, establish training camps, recruit the youth and train them. Also, they planned to unite all terrorist groups.

The 1st accused also mentioned Chande Rashid Njawi of Tegeta Dar es Salaam and Jihad Gaibon Swaleh as his colleagues. After that, he detained the suspect in the lockup and continued with the investigation.

PW6 further testified that on 9 August 2015, between 14:00 and 15:00 hours, they succeeded in arresting Rashid Omary Njawi (2nd accused person) at his home at Tegeta following the information that he participated in terrorist acts and also because Zahaq mentioned him.

After arrest and upon oral interrogation, the 2nd accused person revealed how he participated in terrorist acts by planning to overthrow the Government of the United Republic of Tanzania and install the Islamic State. The 2nd accused person mentioned Zahaq, Jihad, and his younger brother Rashid Omary Mmigwa, who was living at Likawage Kilwa as his colleagues in terrorist acts. He sent the 2nd accused person to Oysterbay Police Station and detained him. After that, he continued with the investigation.

He further testified that on 13 August 2015, an investigation team went to Kilwa at Likawage Village to look for Rashid Omary Mmigwa (3rd accused person) following the information given by his brother Chande Rashid (2nd accused person) that there was a training camp and a gun hidden at Likawage. On 14 August 2015, he was informed that the 3rd accused person was arrested, and the weapon was recovered.

Furthermore, PW6 testified that Jihad (4th accused person) was the leader of terrorist activities. When he escaped from the country, he was

arrested at the Airport in Istanbul, Turkey, between June and July 2014, with his pregnant wife on transit/ way to Syria to join ISIS. Jihad was the former leader and participated in the planning to overthrow the government.

When he left the country, he handed the leadership to Zahaq Ngai.

In the end, they were satisfied that the accused persons were the ones who participated in terrorist activities.

According to the evidence of **PW7 (P2)**, on 22 July 2015, when he was at his office at Police Headquarters around 08:00 hours, he was assigned to record the statement of the 1st accused person who was detained at the central police station. Then he prepared his office for interrogation and at 08:15 hours, he went to the Central police station to take the accused person. He was with the driver, and they arrived at 08:30 hours. When he completed taking the 1st accused person, who was in the lock, at 08:40 hours, they boarded the vehicle and returned to Police Headquarters, where they arrived at 08:55 hours.

PW7 testified before recording the cautioned statement; he introduced himself and informed the suspect about his rights and the alleged offence. After recording the cautioned statement, P7 first read that statement to the 1st accused person, and later, the 1st accused person

requested to read it to satisfy himself if the statement reflected the information he stated when interrogated. Then, the 1st accused person signed the statement on each page and put his thumbprint. To that effect, he tendered

i. The cautioned statement of the 1st accused person as Exhibit P6.

It is on record that though the cautioned statement of the 1st accused person was admitted, its admission was objected to by the defence side. The reason being the statement was obtained involuntarily because the 1st accused person was tortured before he recorded the statement and was forced to sign the statement while he did not know what was written.

In his evidence, **PW8 (P1)** testified that on 9 August 2015, he was at the police headquarters and was assigned to record the cautioned statement of the 2nd accused person who was detained at Oyster Bay Police Station after being arrested that day.

At Oyster Bay Police Station, he prepared a room for interrogation. Before recording the cautioned statement, he introduced himself and informed the suspect of his rights and the alleged offence. After recording

the cautioned statement, the 2nd accused read it himself to satisfy if it reflected the information he stated when interrogated. Then, the 2nd accused person wrote a certification, signed the statement on each page and put his thumbprint. To that effect, he tendered

i. The cautioned statement of the 2nd accused person as Exhibit P7.

Though admitted, the cautioned statement of the 2nd accused person was objected to its admission by the defence side for the reasons that when the statement was made, he was denied the right to legal counsel, he was tortured, and there was a non-compliance with sections 57 and 58 of Criminal Procedure Act.

Another prosecution witness, **PW4 (P),** testified that after the 2nd accused person during interrogation mentioned that they had a firearm and it was in possession of Rashid Omar Mmigwa (3rd accused person) at Likawage Village in Lindi on 13 August 2015, together with four police officers and the 2nd accused person left to Likawage Village. They arrived at Likawage Village around 06:45 hours and joined with two militias. At 07:00 hours, they arrested the 3rd accused person at his home.

PW4 further testified that upon interrogating 3rd accused person orally, he confessed to participating in terrorist acts, and he had one gun,

which he hid in the nearby forest. With the escort of the Village Chairman and another civilian, the 3rd accused person led them to where he hid the gun. In the forest, the 3rd accused showed them where he hid the gun and the ground/field where they were conducting military exercises. When they went to that place, they left the 2nd accused in the police vehicle with militias.

Furthermore, PW4 testified that when he dug, they found the gun wrapped in a light nylon bag. It was SMG AK47, serial number NY 7120, and a magazine with a sawed-off/ cut butt stock and barrel. Then he labelled the gun with No. 1 and the magazine with No. 2.

Upon completion, he prepared and signed the certificate of seizure. The 3rd accused person, the village chairman and another civilian also signed the certificate of seizure. To this effect, he tendered

i. *Certificate of Seizure dated 14 August 2015 admitted and marked as Exhibit P4.*

They returned to the village, dropped off the witnesses, and departed for Lindi, arriving at Lindi Central Police around 09:55 hours. After signing the exhibit register, he handed over the gun to the exhibit keeper around 10:00 hours. That gun was registered as No.1/ 2015.

PW4 further testified that he sent the 3rd accused person to the charge room office (CRO) and opened the case file, which had LIN/IR/100/2015 as a reference number. The offence was to be found with the firearm. Then, at 10:15 hours, the suspect was detained in the lockup.

On the same day, at 13:45 hours, he was assigned to record the cautioned statement of the 3rd accused person.

Before recording the accused person's cautioned statement, PW4 introduced himself and informed him about his rights and the alleged offence. After recording the cautioned statement, the 3rd accused person read it to satisfy himself if it reflected the information he stated when interrogated. After he was satisfied, he signed the statement. The recording of the statement started at 14:05 hours and ended at 15:48 hours. To that effect, he tendered

i. *The cautioned statement of the 3rd accused person as Exhibit P5.*

It is on record that though the cautioned statement of the 1st accused person was admitted, its admission was objected to by the defence side. The reason being the statement was obtained involuntarily because the 3rd accused person was tortured and beaten while recording

the statement and was forced to sign the statement while he did not know what was written. The statement also was recorded beyond the prescribed time of four hours.

According to the evidence of **PW5 (P7),** he witnessed the search. He testified that he was a resident of Likawage Village and he was born in that village 56 years ago.

He testified that on 14 August 2014, the street chairman, witness "P", other police officers and militias went to his home at 07:00 hours. They were with a fellow villager named Rashid Omary Mmigwa, who was arrested. He was informed by the village chairman that Rashid Omary confessed to participating in terrorist acts and owning a gun. Therefore, he was requested to witness the search.

Furthermore, he testified that Rashid Omary led them to the forest, where he hid the gun. When witnessing "P" dug into that area, he found a gun wrapped in a nylon bag. The gun with sawed-off/ cut butt stock and barrel. He was with the chairman, "P", and two other police officers. In the vehicle, they left another suspect, a driver and two militias.

After that, he signed the certificate of seizure (Exhibit P4) and then returned to Likawage Village, where he was dropped off. Around 09:05, "P" and other police officers left.

On the same day, at 11:30 hours, he left Likawage village and arrived at Lindi Police Station at 12:00 hours, where he recorded his statement.

In his evidence, **PW2 (P4)** testified that on the morning of 14 August 2015, while in his office at Lindi Police Station, he received "P," who sent the weapon to be kept in the armory. It was an AK47 with serial number NY. 7120 wrapped in a nylon bag. That gun was marked No. 1, and its magazine No. 2. Also had a cut/sawed-off barrel and buttstock.

Then, he filled out form No. 145 and wrote the IR number in the exhibit. The handing over was done through the exhibit register and "P" signed the same. He listed the firearm in the register and kept it in the armory. To that effect, he tendered;

i. The court exhibit register as Exhibit P5.

He further testified that on 19 August 2015, he was instructed to hand over the gun to "P5" so that he could take it to Dar es Salaam for analysis. Then "P5" signed the register, and he gave him that gun.

According to **PW3 (P5)**, on 19 August 2015, around 06:00-07:00 hours, he was instructed by the Regional Crimes Officer (the RCO) of Lindi to collect the gun from the armory at Lindi Police Station and send it to the Forensic Bureau Laboratory in Dar es Salaam for analysis. He was given the

letter with reference no. LND/CID/B.1/137, dated 19 August 2015, which mentioned the gun make SMG AK47 with serial number NY 7120.

After signing the register book, he collected the gun from the exhibit keeper "P4".

Further, he testified that he serviced his vehicle, departed from Lindi at 23:00 hours, and arrived at the Forensic Bureau Laboratory in Police Headquarters in Dar es Salaam on 20 August 2015 at 07:30 hours.

At the laboratory, he handed the letter from RCO and the gun to "P3," who registered the firearm and labelled it with the reference number FB/BALL/LAB/18/2015.

PW1 (P3)- testified that he received the gun, which was cut/sawed off its barrel and buttstock. The number of the gun was on the receiver cover and the bolt body of that gun. The gun's first letter, "N," was reversed, meaning it was a Russian alphabet, "E."

He measured the gun's caliber using a caliber gauge, a special ballistics ruler, and found it to be 7.62 mm.

Further, he analysed the gun and found it functioning 100% properly. The caliber guided him to discover the type of bullet used in that gun. Therefore, he took three bullets from the laboratory and shot one after

another, and both exploded. That means the gun was properly functioning. It was made of iron (stainless steel) and wood. Wood was in parts that did not require contact with bullets.

After that, he collected the three bullet covers he used to test the gun and labelled them with the initials T1, T2, and T3, together with the weapon's number, laboratory registration number, and IR number, which was LIN/IR/100/2015. To this effect, he tendered;

i. The gun make AK47 with serial number NY. 7120, magazine and three bullet covers as Exhibit P1.

He prepared the ballistic expert report on 21 August 2015. On 24 August 2015, he handed it to "P5" together with the exhibit to take to the RCO of Lindi. To this effect, he tendered;

i. The expert report dated 21 August 2015 from the Ballistic Laboratory of the Police Forensic Bureau as Exhibit P2.

According to the evidence from **PW3 (P5)**, he collected the gun, report, and cover letter from PW1 (P3) on 24 August 2015, around 15:00-15:30 hours. However, the exhibit also includes three bullet covers kept in a nylon packet with a red seal and labelled T1, T2, and T3 on each cover.

He signed the register and departed for Lindi, arriving on 25 August 2015 at 18:00. He was delayed because his vehicle had broken down at

Nangurukuru area. Therefore, he serviced his vehicle from 07:00 to 15:00. Upon arrival at Lindi, he handed the weapon (exhibit P1) to "P4."

In his evidence **PW2 (P4)**, he confirmed receiving the gun (exhibit P1) from P5. The handing over was done through the register, which he signed after receiving the firearm.

On 21 April 2024, he was directed to take the gun to court in Dar es Salaam, and on 22 April 2024, he handed it over to the State Attorneys in this case.

In their defence, the 1st, 2nd,3rd and 4th accused persons testified under oath as DW1, DW2, DW3 and DW4, respectively, both categorically denied having committed the offences charged.

DW1, Zahaq Rashid Ngai, a former police officer, told this Court that on 21 July 2015, he was shocked to see his name in Habari Leo Newspaper, listed in a wanted list of criminals who invaded Staki Shari Police Station. On 22 July 2015, he decided to report to Central Police Station accompanied by his two wives.

He was taken to the Zonal Crimes Officer (ZCO) and asked what he knew about the incident at Staki Shari Police Station.

That day, from 12:00 a.m., his two houses were searched: Malela Tuangoma, where his junior wife, Asha Yusuph, lived, and Mtoni Kijichi, where his senior wife, Khamisa Ally, lived. After the search, nothing was found. They were returned to Central Police Station around 17:30 hours. He was detained in lockup without being informed of my offence, but his wives were released home.

He further testified that, on 23 July 2015, he was taken to Mikocheni, where he met people in civilian clothes, but others carried firearms. Upon his arrival, he asked frequently as to why he killed the police officer. He was slapped in his back and ears and asked to mention his colleagues.

After that, he was given a "board" to hold and he was taken photos. Later, he was sent inside a room with two tables and clubs. He was ordered to take off my trouser. Then, he was handcuffed and hung his legs and hands between the tables using an iron pipe. He was beaten in the sole by using a club for about 30 minutes and was asked about my colleagues with whom they invaded Staki Shari Police Station.

He further testified that after that torture, he could not walk; he crawled using his butt. In the evening, he was taken to Mabatini Police Station, where he was given a small amount of food, the kind of meal he had been given for 43 days under police custody.

On Friday, July 24, 2015, at 09:30, he returned to Mikocheni. Inside the sitting room, he was shown the Al Nuur newspaper, which had his photo on the front page. He was asked about his relationship with the newspaper's owners and why they defended him. One person took the file of his employment at the police and started to read his Form Six certificate, looking for Islamic knowledge Results, which he got an" F". Then, he said they were defending a person who did not even know Islam. Then he was kicked in the chest and beaten by clubs in my legs' crusts. Later, he was returned to Mabatini Police Station.

On 25 July 2015, he returned to Mikocheni and met with the person who had interrogated him the previous day outside the house. There was a table, and he had his employment file, which contained personal information such as his age, place of domicile, tribe, and educational background. That person also had a notebook. He was interrogated, and that person compared his answers with the information in the file and recorded it in the notebook. He was also asked about the names of his siblings, where they were living, and the names of his wives and children.

He was not told of his crimes and later returned to Mabatani Police Station.

On 27 July 2015, at about 10:00 hours, he was taken back to Mikocheni, where the police officer who took his personal information came with three papers already written, and he was ordered to sign with the same signature as in his file. When he asked why he should sign while he didn't know what was written, he was beaten in his back and threatened to be killed. Then he signed and put a thumbprint. After that, he was taken back to Mabatini until 1 September 2015, when he was taken to the Central police station.

DW1 also testified that, on 2 September 2015, he was arraigned before Kisutu Court together with two people he did not know and charged with the offence of conspiracy to commit terrorist acts.

It was his first time seeing those co-accusers, Chande Rashid Njawi and Rashid Omary Mmigwa.

On 9 February 2023, Deputy D. P. P. went to Ukonga Prison with Police officers with the intention of releasing 40 remandees on bail, and he was one of them. Two offices were used in that process. In the first room, he was asked his names, when he was arrested, the alleged offences, and the names of the sureties. In the other room, he was asked about the relatives he would visit if released and their addresses. Then, he was taken

photos and fingerprints. Later, 34 remandees were released, but 6, including him, were not released.

On 29 March 2023, they were taken to Kisutu court and released, but they were re-arrested, charged, and joined with the 4th accused person, who had been in remand prison since 2014. To that effect, he tendered

i. *The charge sheet for P. I No. 4 of 2022, filed at the Dar es Salaam RMs Court at Kisutu as exhibit D1.*

DW1 continued to defend himself by testifying that he had never participated in any meetings in the places mentioned in the information and didn't know any persons who alleged they participated in those meetings. There was no evidence that he was even seen in those meetings. Further, no communication was tendered to prove that he communicated with those people. Also, the prosecution failed to bring evidence from the neighbours or residents of the house alleged to have been used for the meeting or the street leaders.

Further, the prosecution failed to specify the location of the meetings at Tegeta Mivumoni, whether they were in the Mosque, football ground, or house, and if it was a house, the number of that house. No evidence was also tendered regarding the meetings at Likawage.

On the 2nd Count, he testified that the offence was alleged to have been committed on 14 August 2015, while according to the cautioned statement, he was under police custody at that date. The statement was recorded on 22 July 2015. Therefore, that was impossible. The same as the 4th Count.

Regarding the 3rd Count, there was no evidence tendered in this Court to prove that offence.

DW2, Chande Rashid Njawi testified that on 15 August 2015, at about 19:00 hours, when he was from the Mosque for prayers, he was arrested and taken to Central Police Station.

The next day, he was taken to Mikocheni area in a house known as "base". Inside the house, in the corridor, he was ordered to sit down while he was handcuffed.

He was asked his name, where he lived, and why he was causing chaos at Masjid Ijumaa in Tegeta. He was told there was chaos between the elders and the youth because of income from the parking fees. When he responded that he was a passerby at the Mosque, they were not satisfied, and he was slapped.

He testified that he was ordered to stand up and remove his clothes. He was slapped and threatened, so he decided to undress his clothes. Then, he was taken to a room called the "garage" while he was naked. Inside that room were two tables, clubs, a stick, and an iron pipe. He was ordered to sit down and bend my legs. They put an iron pipe between his legs and hands, and he was hung between the tables, beaten by a club and stick and asked who was their leader at Mosque Chaos.

Furthermore, DW2 testified that it was routine to be taken from Central Police to the "Base" for three days. After three days, he was forced to sign documents which he did not know what was written. He was beaten and forced to sign that statement.

On the first day at "base", he requested his relatives or advocate to be called and present during interrogation, but he was denied that right. Further, when he was under police custody, he was given only one meal per day, which was not enough. Further, it was not true that Rajab@Roja, a Kenyan citizen, rented a room in his house.

From 15 August 2015 up to 2 September 2015, he was under police custody until he was sent to the Kisutu Court and charged with the offence of conspiracy with the 1st and 3rd accused persons in **P.I No. 1 of 2015.**

At the Court, he showed his legs, which were swollen but not treated.

In 2023, the officers from the investigation department and the office of the DPP came to the Prison to process the bail. During that process, two rooms/offices were used. In the first room, he was asked his name, where he would live and who would be my sureties.

In the other room, he was asked to sign the documents and he was taken the fingerprints and photos. While waiting for the release, they were sent to the Court, and the charges were dropped. But they were arrested and recharged before another magistrate, and another accused was joined in the charge with four counts.

He further stated that he never committed the first count. Also, the second count was alleged to have been committed on 14 August 2015, while the alleged cautioned statement was recorded on 13 August 2015.

According to witness "P," who recorded the cautioned statement that he led them to Likawage on 13 August 2015, that means the gun was recovered before he led them to Likawage. Further, witness "P" did not testify how he participated in the recovery of the weapon.

Regarding the 3rd offence, there was no evidence of any agreement. Also, the last offence was not true as he never possessed a firearm.

He concluded by testifying that he did not know any of the co-accused before being arraigned together.

In his defence, **DW3 Omary Rashid Mmigwa** testified that one morning, while at his home, he was arrested by more than police officers who asked if he was Ally Omary Mwangu. When he mentioned that his name was Rashid Omary Mmigwa, he was handcuffed. Two of the police officers had firearms, and he was transported to Kilwa Masoko Police Station, where he was detained in the lockup.

Later, he was taken by three police officers; among them, one had a gun to a room where there were other police officers. Inside the room, there were two tables, cupboard clubs and an iron pipe. He was ordered to take off my shirt and sit down. He was asked his name, job and the names of his siblings. When he asked the reason, he was slapped and undressed his trouser. The iron pipe was placed between his hands and legs and hung between the two tables. He was beaten while his head was upside down. At that time, he told the police officers what they asked: the names of my siblings/relatives; he was born in Likawage within Kilwa District, his mother was Mariam Salum Lipangula, and they were three children. A police officer was writing in the papers, and he was told to sign those papers while he did not know what was written. When he refused, he was

hanged again and beaten until he was injured. Then, he signed the papers with my thumbprint. Then, he was detained in the lockup for three days and transported to Dar-es-Salaam straight at Staki Shari Police Station.

On 2 September 2015, he was charged with P. I No. 51 of 2015 at Kisutu Court for the offence of conspiracy to participate in terrorist acts together with the 1st and 2nd accused persons. On 10 September 2015, the case was withdrawn, but a new charge was filed. The offence was a conspiracy to commit terror acts, and two people, Duwa Said Linyama and Issa Abdulrahman Kokoko, were added.

On 9/2/2023, officers from the DPP's office and criminal investigation department visited Ukonga prison to speak with suspects of terrorism-related crimes who had not committed High Court. Two offices/rooms were used for that exercise. In the first room, he was asked his name and where he was living. Then he was asked if he would be released on bail, where he would live, and the sureties' names in the second room, where he had taken fingerprints and photos.

DW3 further testified that the charge was withdrawn on 29/3/2023. However, they were rearrested and charged again, this time with the 4th accused person. That day, he complained about the torture at the Police

station and was given a small amount of meal once per day, which affected his health.

Testifying on Exhibit P5, he stated that he was not sure the thumbprints were his. Further, he was forced to sign, and also, he was beaten.

Regarding the evidence of "P" that he confessed when he arrested him, he testified that "P" did not interrogate him. Also, it was not true that he led "P" to the place where the gun was found. After his arrest, he was transported straight to Kilwa Masoko Police Station.

DW3 further testified that he had no relationship with Chande Rashid Njawi and that his siblings were Salum Omay and Yahya Omar. Therefore, the information in the cautioned statement was not true, and his mother never married any other man. Also, the information regarding his educational background was false because he started school in 1980 and completed it in 1986. And he had never been a madrassa teacher.

Regarding the co-accused, he testified that he met them for the first time when they were charged together.

Furthermore, he testified that he had never participated in any meetings, and there was no evidence or communication that there were meetings.

He further testified that the 2nd count indicated it was committed on 14/8/2015 at Tegeta Mivumoni and Likawage, then how the gun was hidden two months earlier at Likawage village.

DW3 also commented on the evidence of "P7", that despite saying that he was 56 years old and a resident of Likawage but, when cross-examined the next village to Likawage or neighbouring villages he did not know. That witness also stated that Likawage is in Lindi District while it is in Kilwa District. He was asked if he knew Nangulukuru area, but he said he did not know, while you cannot go to Lindi from Likawage without passing at Nangulukuru. Also, he said he travelled by motorcycle from Likawage to Lindi for one hour, while it usually takes 2:30 hours or 3:00 hours.

Further, "P7" stated there was only one primary school at Likawage, while there were two: Likawage Primary School and Nailokwe Primary School.

In his further evidence, DW3 testified that the evidence of P3 at the Court differed from his report. In his evidence, he stated the gun was cut/sawed off its barrel and butt, while in the report, the gun was okay.

Also, he stated that the court should disregard the evidence of "P5" because he mentioned the letter allowing him to take the gun from Lindi to Dar es Salaam and Dar es Salaam to Lindi, but he did not tender those letters. Furthermore, he stated he was handed the gun on 19/8/2045 to take to Dar es Salaam, but he handed it to P3 on 20/8/2015 without informing the Court where he stayed with that gun.

Regarding the evidence of "P4," he testified that the Court should disregard it because he stated that "P" arrived with a gun between 01:00 and 08:00 hours, while, on the other hand, P stated he departed from Likawage at 08:00 and arrived at Lindi around 09:55 hours.

He also stated that the evidence of "P8" was not true because after receiving information that at Likawage, there were persons who participated in terrorist acts, he did not see the importance of following that information to confirm the issues of military exercises and place the alleged exercises were conducted.

When responding to the 1st count, he testified that there is no evidence of communications, documents tendered or witnesses that those plans were in their houses.

Regarding the 2nd Count, he stated that he was arrested at Likawage Village on 14 August 2015. Therefore, committing that offence at Tegeta Mivumoni and Likawage on the same date was impossible.

Testifying on the 3rd and 4th counts, he testified that he had never participated in any training, been registered or owned a firearm.

The last defence witness, **DW4, Jihad Gaibon Swalehe**, testified that After graduating from the International University of Africa-Khartoum Sudan in 2008, he was a lecturer at Al Maktoum College of Engineering, teaching IT studies. In preparation for that trip, the Turkish Embassy requested his passport and a criminal clearance form from the Police force. Then, he was given a tourist visa. After that, he purchased a return ticket for the trip to travel on 2/6/2014 and returned on 8/6/2014.

To that effect, he tendered;

ii. Air ticket dated 21 May 2014 with No. 23521298188875 as exhibit D1.

After arriving in Istanbul on 3/6/2014 around 10:00 at the airport passport clearance desk, he was stopped by officials who took him and his

wife inside the airport office. Then, they were informed that they were returned to Tanzania without being informed of the reason.

They were escorted by one person who held their passports, copies of the criminal clearance report, and hotel bookings.

When they arrived in Dar es Salaam on 4/6/2015, they were taken to the police office inside the airport. A woman police officer asked why they were returning.

Later, at 10:00 hours, other police officers transported them to the Central Police Station. At about 12:00 hours, they were taken to where we lived. The police officers interrogated his mother, and after that, they took him back to the Central Police Station and left his wife at home.

The police officers told him they wanted to satisfy themselves as to why he was deported; then, he was detained in the lockup.

On the morning of 5/6/2014, he met the Immigration officer who questioned him. The next day, the police investigator informed him that his issue was under investigation.

He was detained for about one and a half months, and on 16/7/2014, he was sent to Kisutu Court and charged alone with P. I No. 28 of 2014 with the offence of conspiracy to commit terrorism acts and facilitation of

terrorism acts. The offence of conspiracy was committed at an unknown place in Dar es Salaam, and the offence of facilitation of terrorist acts was conducted in Kenya.

That charge was withdrawn, but he was re-arrested and charged with P.1 No. 3 of 2015 with the same two offences. However, in the particulars of the offence, there was an addition that he was communicating with two persons. To that effect, he tendered;

i. The charge sheet dated 19/01/2015 for P.I No. 3 of 2015 as exhibit D3.

DW4 further testified that the case was withdrawn, but he was arrested and taken to the Central Police Station. After two days, he was taken to Mikocheni in a house known as the "base."

Inside the house, he was informed that he was in the special operation area. When he requested that his lawyer be called, one person wanted to beat him. But others stopped that person and told him that he was the "property of the court.

Later, he was taken back to Central Police and on 5/3/2015, I was sent to Kisutu Court and charged with P. I No 31 of 2015 with one offence of facilitation of terrorist acts.

Later, the charges were dropped and charged again with P. I No.31 of 2023, together with the co-accused.

Regarding the prosecution evidence, he testified that it did not touch him and that he never attended any meetings at Tegeta Mivumoni, Mbande, or Likawage. Further, neither witness mentioned Tegeta Mivumoni; even the house where the meetings were allegedly conducted was not mentioned.

He also stated that he had never visited Likawage or Hassan Mkomwa, for whom it was alleged that the meetings were conducted at his house in Mbande. Street leaders or neighbours were brought to testify.

Regarding the second count, he testified that on 14/8/2015, when the offence was alleged to have been committed, he had already been in prison for more than a year.

Testifying on the 3rd and 4th counts, he stated that there was no evidence that he was recruited into terrorism activities, and he was also in prison on 14/8/2015; therefore, it was impossible for him to commit that offence.

After the closure of the defence case, both the prosecution and defence counsel filed their final submissions, and I commend them for the job well done in narrating important issues in the case.

Having considered the evidence on record, the main issue before this Court for determination is;

> *"Whether the prosecution has proved the case beyond a reasonable doubt".*

This is because it is the cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. See **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 (Tanzlii).

In the written submission, the prosecution side submitted that the case was proved beyond reasonable doubt based on;

a. Oral confession of the accused persons
b. The weapon (a gun make SMG AK 47 with serial number NY 7120) found in the possession of the accused persons.
c. Cautioned statement of the 1st, 2nd and 3rd accused persons and

Therefore, the sub-issues here are **one,** *whether the accused persons confessed orally*; **two**, *whether the accused persons were found to*

possess a gun of the type SMG AK47 with serial number NY 7120; and **three**, *whether the accused persons confessed in their cautioned statements.*

Starting with the first sub-issue, the prosecution submitted that the 1st, 2nd and 3rd accused persons confessed orally before PW4 and P6.

In his evidence, PW6 stated that after the 1st accused person surrendered at the Central Police station and upon oral interrogation, he confessed to participating in terrorist acts and mentioned 2nd accused person as his colleague in those terrorist activities. He also mentioned that the 4th accused was their leader (Amir) and had escaped to Syria through Turkey.

Also, PW6 stated that after arresting the 2nd accused person, he also confessed orally to participating in terrorist acts. He mentioned the 3rd accused person, his younger brother, and had a gun hidden at Likawage Village.

On his side, PW4 stated that when he arrested the 3rd accused person before the search, he confessed orally that he participated in terrorist acts.

Therefore, there were oral confessions of the 1st, 2nd and 3rd accused

persons before the police officers who were PW4 and PW6.

On this, in their final submission, the prosecution relied on section 3 (1) (a) of the Evidence Act [Cap. 6 R: E 2022], which reads that;

> *"An oral confession made by a criminal suspect is admissible and may be used to convict an accused person."*

And cited the case of **Posolo Wilson @ Mwalyengo vs. The Republic,** Criminal Appeal No. 613 of 2015, CAT at Mbeya (unreported). Where it was held that;

> *"It is settled that an oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found conviction against the suspects".*

On their side, the counsel for the 1st, 2nd, 3rd and 4th accused persons did not submit regarding oral confessions.

Admittedly, oral confession may be sufficient to find conviction against the suspects. See **The Director of Public Prosecutions vs. Nuru Mohamed Gulamrasul, [1988] T.L.R. 82.**

However, there are established principles to rely on the oral confession before convicting the suspect. The conditions are elaborated in several cases, such as;

One, in **Chamuriho Kirenge @ Chamuriho Julius vs. The Republic**, Criminal Appeal No. 597 of 2017 (Tanzlii) where it was held that

> *"The Court insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him. It means, therefore, that even where the court is satisfied that an accused person made an oral confession, still the trial court should go an extra mile to determine whether the oral confession is voluntary or not".*

Two, in **Joseph Mkumbwa and another vs. The Republic**, Criminal Appeal No. 94 of 2007, CAT (unreported), it was held that

> *"...should, therefore, have been treated with a lot of caution and in practice, it should have been corroborated by some other independent evidence. Such corroborative evidence was not forthcoming in the present case".*

Three, in **Ntobangi Kelya and another vs. The Republic**, Criminal Appeal No. 256 of 2017 (Tanzlii), the Court of Appeal held that:

> *"Equally, the appellant is alleged to have made such confessions in the presence of a group of village vigilantes (sungusungu). In **Regina Karantina and Another v. R.,** Criminal Appeal No. 10 of 1998 (unreported), it was held that although in law, sungusungu were not policemen, in real life, they had more coercive power than ordinary citizens and, therefore, feared. In fact, PW2 admitted that he was their Commander. Such confessions must be corroborated as*

a matter of practice."

From the above-cited case, for the oral confession to be relied upon, **one**, the suspect must be a free agent, and **two**, there must be corroborative independent evidence.

The question is whether the 1st, 2nd, and 3rd accused persons were free agents when they orally confessed to PW4 and PW6, who were the police officers.

On this, the prosecution evidence indicates that the alleged confession was made by 1st accused person at the Central Police Station, the 2nd accused person at Oyster Bay Police Station and the 3rd accused person at his home at Likawage Village when he was arrested by PW4, three police officers and two militias.

Therefore, all accused persons were under arrest and custody when they were alleged to confess orally.

In such circumstances, that they were under arrest and custody, they were not free agents, and the accused persons could have been fearful. Therefore, the alleged oral confessions by the 1st, 2nd and 3rd accused persons must be corroborated.

At the trial, the prosecution did not provide evidence to corroborate the alleged oral confessions before PW4 and PW6. Even the police officers and militias whom PW4 stated they were together when they arrested the 3rd accused person were not called to testify, at least to corroborate the oral confession of the 3rd accused person before PW4.

In this case, it was crucial for oral confessions to be corroborated, considering that both PW4 and PW6 (the investigator) recorded their statements as witnesses after the suspects' cautioned statements had already been recorded by PW4, PW7, and PW8.

Therefore, the evidence that the accused persons confessed orally is unreliable and weak.

Regarding the second sub-issue on whether the accused persons were found to possess a gun of the type SMG AK47 with serial number NY 7120.

On this, it is the evidence of PW4 that the 3rd accused person led them to the forest, where he hid the gun (Exhibit P1).

According to PW4 and PW5 (a villager from Likawage Village and an independent witness), the 3rd accused person witnessed the search. After the search, PW4 seized and recorded the seized weapon in Exhibit P4 (the

certificate of seizure). PW5 also witnessed the search and signed the certificate of seizure as an independent witness.

In the prosecution's final submission, they stated that exhibit P4 was admitted without objection, and they cited **Eupharacie Mathew Rimisho T/A Emari Provision Store & Another vs. Tema Enterprises Limited & Another,** Civil Appeal No. 270/2018, CAT (unreported) at page 15, where the Court held thus:

> *"...it is settled law that the contents of an exhibit, which was admitted without any objection from the appellant, were effectually proved on account of failure to raise an objection at the time of its admission in evidence."*

On her side, the counsel for the 3rd accused person raised two issues.

One, exhibit P4 did not have the signature of the relative or any person, and that was contrary to Section 38(3) of the CPA.

Two, PW5 was not a credible witness because despite saying that he was from Likawage Village, he did not know in which district Likawage Village is located, and he did not know the Nangulukuru area. Thus, he was not familiar with the Village of Likawage. She cited the case of **Goodluck Kyando vs. The Republic** (2006) TLR 363.

Regarding that kind of evidence, the prosecution, in their written submission, submitted those were minor discrepancies in details due to lapse of memory on account of passages of time which should always be discarded. They insisted that only fundamental discrepancies would discredit the witness. They cited **EX. G. 2434 George vs Republic,** Criminal Appeal No.8 of 2018 (Tanzlii), where the Court of Appeal held that;

> *"Minor contradictions are a healthy indication that the witness did not have a rehearsed script of what to testify in Court."*

And **Chukwudi Denis Okechukwu and three others vs. The Republic,** Criminal Appeal No. 507 of 2015 (Tanzlii), where it was held that;

> *"It is apparent from the words of the author that it is inevitable to find people who have eye-witnessed the occurrence of one event, giving contradicting accounts of its occurrence. And with lapse of time, the gap of contradiction may even widen. What is pertinent, therefore, is to look at serious contradiction which goes to the root of the matter".*

Having considered the evidence on record and the final submissions in this issue, I have the following;

In criminal cases, the procedure of search and seizure is crucial. It is a foundation for establishing the chain of custody of seized properties. Therefore, the prosecution is not only required to comply with the laws governing search and seizure but also must prove that the evidence on search and seizure meets the standard set in criminal trials.

Unlike the Drugs Control and Enforcement Act [Cap 95 R: E 2019], which provides for the procedure of search and seizure, the Prevention of Terrorism Act, No. 21 of 2002, does not have that provision. Therefore, in such a circumstance, the law applicable is the Criminal Procedure Act, Cap 20. The relevant section is Section 38 (3) of the CPA. The section reads;

> *"Where anything is seized in pursuance of the powers conferred by subsection (1), the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".*

Therefore, calling for an independent witness is mandatory under the CPA. Section 38 (3), cited above, mandatorily provided for the need for an independent witness. The position is also held by the Court of Appeal in **Jibril Okash Ahmed vs. The Republic**, Criminal Appeal No. 331 of 2017

(Tanzlii), when discussed the applicability of 48(2)(c)(vii) of the DCEA and 38(3) of the CPA, it held that;

> *"In the present case, the learned trial judge discussed sections 48(2)(c)(vii) of the DCEA and 38(3) of the CPA and found that the former does not imperatively provide for the need for an independent witness while the later requires an independent witness to sign the seizure certificate if present. That is the legal position".*

In this case, the independent witness was PW5 and the certificate of seizure was admitted without objection. That was why, in the final submissions, the prosecution, by citing **Eupharacie Mathew Rimisho (Supra),** stated that since the certificate of seizure (Exhibit P4) was not objected then, the contents of that evidence were proved.

However, failure to object to tendering of the exhibit is one of the criteria; there are other criteria to impeach that evidence. In **Anna Moises Chissano vs. The Republic,** Criminal Appeal No. 273 of 2019(Tanzlii), it was held that;

> *"An accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record*

unchallenged, it is, in law, taken to have been admitted by the accused".

Therefore, the criteria is not only based on the failure to object but also on the failure to cross-examine.

At the trial, when PW4 was cross-examined by the counsel for the 4th accused person, he responded that exhibit P4 was signed by himself and two independent witnesses.

PW5 testified that he was one of the independent witnesses who signed the certificate. In his evidence, he stated that he was 56 years old, born and lived in Likawage Village, and studied up to the secondary school level, reaching form II.

When cross-examined by the counsel for the 3rd and 4th accused persons, he did not even know where Likawage Village was located and the neighbouring villages. He stated that the village is in Lindi District, while other witnesses said it was in Kilwa District. Further, he did not know where the road to the west of Likawage goes to which place. Also, PW5 stated that he had never visited Nangurukulu area. In contrast, PW4 stated that when they departed from Likawage to Lindi, they passed through the Nangulukuru area/village, 60 kilometres from Likawage, with a rough road.

As alluded to earlier, the prosecution submitted that those were minor discrepancies in details due to lapses of memory on account of passages of time.

In my firm analysis of that evidence, I hold if PW4 was really the resident of Likawage Village who was born in that village 56 years ago and attended the search as an independent witness, why, during the cross-examination, did not even know the location of that village.

In the cited case of **Goodluck Kyando (supra),** it was held that;

> *"It is a trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

From above, it is clear that while every witness deserves credence, PW5 (an independent witness) cannot be held to be a credible witness in view of the evidence concerning his attendance at the search and seizure.

Further, this is not a minor discrepancy due to lapses of memory on account of passages of time, as the prosecution suggests. In **Mohamed Said Matula vs. Republic** [1995] TLR3), it was held that

> *"Normal discrepancies in evidence are those which are due to normal errors of observation; normal errors of memory due to lapse of time, due to mental disposition such as*

shock and horror at the time of the occurrence, and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do."

In my firm view, that was not a trifling discrepancy, such as the colour of clothes or the exact time when the offence was committed. This is material and not normal. It is not expected from PW5, who introduced himself as a born resident of Likawage Village, but he did not know the location of that village and the neighbouring villages.

Therefore, this goes to the root of the matter, which corroded PW5's evidence as to whether he was indeed a resident of Likawage Village who witnessed the search as an independent witness. If he failed to know the location of the village where he was born and lived, how can one believe he witnessed the search or that he was indeed the independent witness from Likawage Village, taking into account that accused persons were not able to see the witnesses who were in the covered witness box.

In addition, some of the witnesses to the search and seizure were not summoned to testify at the trial. It is trite that the prosecution was not bound to summon any particular number of witnesses in the case, as what matters is credibility, not numbers.

Nevertheless, why was the village chairman, who was one of the independent witnesses and who also signed exhibit P4, not called to testify at the trial.

According to PW5, the village chairman requested him to participate in the search. Therefore, in my view, the evidence of the village chairman becomes more important on account of the unreliable testimony of PW5, whose credibility is questionable because he did not even know where the Likawage Village is located.

In **Aziz Abdallah vs. The Republic** (1991) TLR 91, it was held that

> *"Where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one".*

Flowing from above, in the circumstances of this case, I am entitled to draw an adverse inference on account of PW5's questionable credibility and the failure of the prosecution to summon an important witness, the

village chairman, whom it was testified that he also signed exhibit P4 and was the one who went to PW5 and in the presence of PW4, requested him to participate in the search. No explanation was given for that failure to call the village chairman.

Therefore, though exhibit P4 was admitted, what happened during the cross-examination of PW5 (an independent witness) watered down the weight of that document. The document, exhibit P4, is unreliable and uncredible due to PW5's questionable credibility. PW5 does not deserve any credence.

Thus, what is left is exhibit P4, with PW4 as the only witness who testified. This is contrary to section 38 (3) of the CPA, which imperatively provides for the need for an independent witness during search and seizure. Therefore, the search and seizure were not conducted properly according to the law.

On the third sub-issue, at the trial, the cautioned statements of the 1st, 2nd and 3rd accused persons were admitted as exhibits P5, P6 and P7, respectively, despite the objections. They were both retracted and repudiated.

In the prosecution's final submission, they submitted that the position of law is that corroborative evidence is necessary, where the evidence is

solely based on the confessional statement of the accused person or co-accused confessional statement.

In this case, the prosecution mentioned oral confessions, the recovery of the weapon (exhibit P1), circumstantial evidence, and the conduct of the 4th accused person as corroborative evidence to the cautioned statements.

To substantiate this issue, they cited **Sharifu Mohamed @ Athumani and four others vs Republic** Criminal Appeal No. 251 of 2018 (Tanzlii), at page 64, where the Court of Appeal held;

"*The evidence of conduct is sufficient to render corroboration.*"

And **Pascal Kitigwa vs. Republic [1994] T.L.R 65** where it was that;

> *"Corroborative evidence may be circumstantial and may well come from the words or conduct of the accused and, in this case, the appellant independently corroborated the evidence of the co-accused."*

The position of the defence side was that the cautioned statements were not corroborated.

To support this argument, the counsel for the 1st accused person cited the **Republic vs. Daniel Ndababonye**, Criminal sessions No. 13 of 2017, where it was held that;

> *"...What may be gleaned from the above cases is the danger of convicting an accused person based on the confession which was retracted or repudiated. To avoid such a danger, such a confession must be corroborated by the evidence of an independent witness".*

The counsel for the 3rd accused person cited the **Tuwamoi vs. Uganda [1967] E. A** at page 91, where it was held that;

> *"As a matter of practice or prudence, the trial court should direct Itself that It is dangerous to act upon a statement which has been retracted in the absence of collaboration in the same material particular, but that the court might do so if it is fully satisfied in the circumstance of the case that the confession must be true".*

While the counsel for the 4th accused person cited, **Tuwamoi vs. Uganda** (Supra), **Ali Salehe Msutu vs. Republic [1980] TLR, Bombo Tomola vs. Republic [1980] TLR 254** and **Nuru s/o Venevas and others vs. Republic**, Criminal Appeal No.431 of 2021 (Tanzlii) where in both cases, the court that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction and it is always desirable to look for corroboration in support of a confession which has been repudiated or retracted.

From above, it is clear that the prosecution evidence is primarily based on the cautioned statements of the 1st, 2nd, and 3rd accused persons. The record shows that the cautioned statements were admitted after trial within a trial. However, defence lawyers strongly objected to their admission, attacked them during cross-examination, and accused persons denied them in the defence case.

At the trial, when objecting to the admission of the cautioned statements and during their defences, both accused persons stated that they were tortured and forced to sign what they did not know what was written.

Therefore, the accused persons' defence was premised, *inter alia*, on the allegations of torture and forced to sign the statements.

On this, there is a plethora of decisions by the Court of Appeal on the subject. In **Mashimba Dotto@ Lukubanija vs. the Republic**, Criminal Appeal No. 317 of 2013 (Tanzlii), it was held that;

> *"...as this Court has held in other cases, once torture is alleged, courts should always be cautious in relying on the statement(s)".*

How to treat that *"cautiousness"*, the Court in several cases, provided for a way forward when torture is alleged and when the statement is repudiated or retracted.

In the cited decision of **Nuru s/o Venevas and others** (Supra), it was held that;

> *"It is trite principle that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction, and it is always desirable to look for corroboration in support of a confession which has been repudiated or retracted."*

Further, in **Tuwamoi vs. Uganda** (Supra), it was held that;

> *"...the court will only act on the confession statement if corroborated in material particulars by independent evidence...*

Therefore, what can be gleaned from the two cited cases above is that **first**, it is important to look for corroboration once the statement is repudiated or retracted, and **second**, there must be independent evidence to corroborate the repudiated or retracted statement.

That is why, even though the cautioned statements were admitted during the prosecution case, this court has a duty to evaluate them after hearing both the prosecution and defence cases.

Regarding the corroborative evidence, I agree with the submission from the prosecution in the case of **Pascal Kitigwa (Supra);** they cited that corroborative evidence may also be circumstantial or may be derived from the words or conduct of the accused person.

Regarding the oral evidence and the recovery of the weapon (exhibit P1), the prosecution side submitted the oral confessions of the 1st, 2nd and 3rd accused persons, which corroborated their cautioned statements.

This should not detain me long because, as I alluded to in the 1st sub-issue, oral confession itself needs to be corroborated, and the suspect must be a free agent.

In **Ali Salehe Msutu (Supra),** it was held that;

"...it is trite law that evidence which itself requires corroboration cannot corroborate another".

Therefore, the oral confession cannot corroborate the caution statement, exhibit P5, P6 and P7.

Equally, the same to the submission that the evidence on recovery of the weapon (exhibit P1) also cannot corroborate the cautioned statements.

In the 2nd sub-issue, I hold that the search and seizure of the firearm fell short of the requirements of section 38 (3) of the CPA. Therefore, the evidence of recovery also cannot corroborate the cautioned statement.

Regarding the conduct of the 4th accused person. This, according to the prosecution, was based on the account of PW6 evidence that the 4th accused person fled and was arrested at Istanbul Airport in Turkey, and the defence failed to contradict the prosecution's evidence that the 4th accused person was fleeing. Therefore, that was a conduct to corroborate the cautioned statements.

On this, the record shows that the investigator of the case, PW6, got that information when he interviewed the 1st accused person orally.

When he was cross-examined by the counsel for the 4th accused person, PW6 respondent, that the 4th accused person was arrested at Istanbul Airport and he was with his wife. He was arrested between June and July 2014, and their intelligence report indicated that he was going to Syria. Further, he did not know who arrested him in Turkey and when he was returned to Tanzania.

In his defence, the 4th accused person stated that he was arrested in Turkey on 2 June 2014 when he landed at the airport on a tourist trip with

his wife, intending to stay in Turkey from 2 June to 8 June 2014 as per the return ticket (exhibit D2). He was not told the reason for his arrest.

When he was brought back, Tanzania authorities asked him why he was brought back. He was detained at Central Police Station Dar es Salaam for about one and a half months, and on 16 July 2014, he was sent to the Court and charged alone with P. I No. 28 of 2014 with the counts of conspiracy to commit terrorism acts and facilitation of terrorism acts.

From the above evidence;

First, PW6's evidence on the account that the 4th accused person fled came from the oral confession of the 1st accused person a year after the arrest of the 4th accused person. As I alluded to earlier, this oral cannot be corroborative evidence because it also needs to be corroborated.

Second, PW6's evidence that, according to the intelligence report, the 4th accused person was fleeing to Syria also needs to be looked at because there is no other evidence to substantiate that allegation. In the book titled **Intelligence as Evidence: Briefing Note** *by Gerard Normand and Alan Jones, published by Ottawa University*, the authors wrote:

> *"The expression "intelligence as evidence," or turning intelligence into evidence, has been at the centre of a longstanding issue in Canadian national security law.*

> *.....The Court must assess the intelligence based on the rules of admissibility of evidence.*
>
> *In order to contemplate using intelligence as evidence in the context of a criminal law proceeding, strict rules of admissibility must be considered. These are the same rules that must apply to any other type of information wanting to be used as evidence. The fact that it is intelligence does not make the rules any easier, simpler or different. Intelligence cannot automatically be made admissible under the rules of evidence".*

Therefore, in the circumstances of this case, intelligence information itself cannot stand as evidence in court without being substantiated. In my firm view, after PW6 received intelligence information, that information was supposed to trigger an investigation to collect evidence that the 4th accused person was in transit to Syria to join ISIS.

From above, since the evidence that the 4th accused person fled to Syria came from the alleged oral confession of the 1st accused person, which I have already held that it is unreliable and that the intelligence information that the 4th accused person was on transit to Syria to join ISIS was not substantiated by any material evidence, then there is no evidence at all of the conduct of the 4th accused person to corroborate the cautioned

statement of the accused persons. Intelligence information cannot escape the rules of evidence; otherwise, it remains a mere allegation.

Concerning the circumstantial evidence, the prosecution's submission was that circumstantial evidence adduced by the prosecution witness P8 (PW6), who testified on how they acquired intelligence information on the accused persons' ongoing illegal activities, qualifies to corroborate the cautioned statements.

In **Bahati Makeja vs. Republic**, Criminal Appeal No. 118 of 2006 (Tanzlii), the Court of Appeal held that;

> *The law on circumstantial evidence is well settled. In a case depending conclusively on circumstantial evidence, the court must, before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than of guilt.*
>
> *All in all, a survey of decided cases on the issue in this country and outside jurisdiction establishes that such evidence must satisfy these tests.*
>
> *(1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established beyond a reasonable doubt;*

(2) those circumstances should be of a definite or conclusive tendency unerringly pointing towards the guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and no one else, and

(4) the circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and should be inconsistent with his innocence

From above, it is my firm view that intelligence information, as PW6 testified, cannot qualify as circumstantial evidence. As I alluded to earlier, that information was not backed up by any material evidence from the prosecution evidence, apart from the alleged oral confession and recovery of the firearm, which I already discounted their weights. Therefore, the evidence circumstantial evidence in this case falls short of the requirements spelt out in the case **Bahati Makeja (supra)** cited above.

In this case, even the cautioned statements and the oral confessions cannot establish circumstantial evidence because the confessions themselves need corroboration.

Thus, there is no circumstantial evidence to corroborate the accused persons' cautioned statements.

Now, I am reverting to the offences in this case to see if there is any other evidence to prove them apart from the issues I decided on in the sub-issues.

The 1st count was Conspiracy to Commit Terrorist Acts. On this, the prosecutions' submission was that the offence of conspiracy could not stand where the actual offence has been committed, as held in the case of **Magobo Njige and another vs. Republic,** Criminal Appeal No. 442 of 2017 (Tanzlii), but since it is a terrorism-related offence the offence of conspiracy can stand alone regardless of whether the actual offence is committed or not.

On his side, the counsel for the 4th accused person submitted that the offence of conspiracy cannot stand where the actual offence has been committed. To substantiate his submission, he cited the decisions of the Court of Appeal of **Steven Salvatory vs. Republic**, Criminal Appeal No. 275 of 2018 (Tanzlii), **Magobo Njige** (Supra), **Hassan Idd Shindo and another vs. Republic**, Criminal Appeal No. 324 of 2018 (Tanzlii) and the decision of the High Court of the **Republic vs. Median Boastice Mwale and others**, Criminal Session Case No. 77 of 2017 (Tanzlii).

To elaborate on the description of conspiracy, he cited **Canada (Attorney General) vs. Lalonde**, 2016 ONCA 923 (CanLII), where the Ontario Court of Appeal in Canada stated that;

> *"a person who enters into a criminal conspiracy, intending to carry it out, but abandons the conspiracy before the object is achieved or the agreement is terminated, remains criminally liable for the crime of conspiracy."*

Further, he stated that the object of criminalizing conspiracy was stated in the case of **Board of Trade vs. Owen** [1957] A.C. 602 at page 626, where Lord Tucker said;

> *"The whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt."*

Therefore, he stated that the offence of conspiracy cannot stand where the actual offence has been committed. Further, in this case, the offence of conspiracy is not an alternative count to the 2nd, 3rd and 4th counts.

On this, the controversy is solved in the cited case of **Magobo Njige** (Supra); the Court of Appeal held that;

> *"On the propriety or otherwise of the count of conspiracy against the appellant, this need not detain us. It is settled*

law that the offence of conspiracy cannot stand where the actual offence has been committed. In this regard, it was not proper to charge and convict the appellants of the offence of conspiracy. This was emphasised in the case of ***STEVEN SALVATORY VS REPUBLIC*** *{supra) as this Court stated that;*

"Finally, we find it compelling to say something on the offence of conspiracy cannot stand where the actual offence has been committed. In our earlier decision in the case of ***John Paulo@ Shida & Another****, Criminal Appeal No. 335 of 2009 (unreported), we held that: -*

"It was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because, as already stated, in a fit case, conspiracy is an offence which is capable of standing on its own." Thus, in the light of settled law, it was not proper to charge the appellants with the offence of conspiring on the offence of conspiracy, for we agree with the learned advocate for the appellant that the conspiracy to commit armed robbery. Therefore, as the offence of conspiracy could not be sustained, the appellants were wrongly convicted of that offence".

In this case, apart from the conspiracy offence, the accused persons were also charged with the offences of collecting Property for the Commission of Terrorist Acts, agreeing to participate in the Commission of

Terrorist Acts, and possessing Property for the Commission of Terrorist Acts, as the 2nd, 3rd and 4th counts respectively.

From above, the law is settled that the offence of conspiracy cannot stand where the actual offence has been committed. The prosecution side alleged that the offence of conspiracy to commit terrorism act can stand alone regardless of whether the actual offence is committed or not.

Not only did the prosecution not cite any provision of law or case law to that effect, but I am also not persuaded by that submission because, in **Magobo Njige** (Supra), the Court of Appeal did not distinguish that some of the codes that establish offences, such as the Prevention of Terrorist Act, allow the offence of conspiracy to stand when actual offences have been committed and charged.

Therefore, as rightly submitted by the counsel for the 4th accused person when citing the **Board of Trade (supra),** the object of making conspiracy punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt. Therefore, once the actual offences have been committed, the offence of conspiracy cannot stand.

Thus, the 1st count of conspiracy to commit terrorist acts cannot stand with the actual offences in the 2nd, 3rd and 4th counts.

Further, it is in the record, according to the investigator (PW6), that the conspiracy was by way of meetings conducted at Mbande area. When cross-examined by the counsel for the 4th accused person, he responded that when he orally interviewed the 1st accused person, he stated that planning meetings were conducted at Mbande area in the house of Hassan Mkomwa, Buguruni and Tegeta.

Apart from that, there was nothing and no evidence that planning meetings were conducted at Mbande, Likakawage, and Tegeta. The investigator did not even mention whether he visited and inspected those places or what his findings were.

For the reasons above, the 1st count is not proved at all.

On the 2nd count of Collection of Property for Commission of Terrorist Acts. The allegation by the prosecution was that both accused persons, on 14 August 2015, at various places between Likawage village within Kilwa District in Lindi Region and Tegeta Mivumoni area, Kinondoni District within the City and Region of Dar es Salaam, one firearm Sub Machine Gun AK 47 with serial No. NY 7120, intending to be used to facilitate the commission of a terrorist act, to wit, establishing an Islamic

state, an act which creates a serious risk to the safety to the public.

For this offence, there is no evidence at all that the accused person collected properties for the commission of the terrorist act. By the way, the evidence reveals that the 4th accused person had already been in remand prison since July 2014; therefore, he couldn't commit that offence on August 14, 2015.

In addition, apart from the general evidence from PW6 that there were police stations which were invaded at Staki Shari and Kimanzinchana, Banks at Mbande Chamazi and Mkuranga and a police barrier at Kongowe area where police officers were murdered, and firearms taken by assailants. But no prosecution witness had testified that the accused persons committed those crimes. Nothing was testified to connect the accused persons with the crimes mentioned by PW6 on whether the accused persons collected properties for the commission of terrorist acts in the mentioned crimes.

Further, it was not revealed if exhibit P1 was collected during the mentioned crimes, and there is no evidence that it was collected at Likawage village or Tegeta Mivumoni. In fact, there is no evidence as to where exhibit P1 was collected.

Therefore, as per the evidence on record, the prosecution side

failed to prove the 2nd count.

Regarding the 3rd count of Agreeing to participate in the Commission of Terrorist Act, this should not detain me long.

According to the information, the accused persons agreed to participate in the commission of terrorist acts. The evidence on record does not reveal anything that the accused persons had agreed to participate in terrorist acts. PW6 only stated that the accused persons established training camps and recruited youths. Further, they planned to unite all terrorist groups.

From the above, it is clear that there is no evidence apart from the intelligence information from PW4, which was not substantiated by any evidence. It was not revealed if the accused persons agreed to be recruited, who recruited them or which designated terrorist group recruited them.

Further, if they recruited the youths, who are those youths who were recruited?

In the absence of evidence of the above issues, the offence of agreeing to participate in the Commission of Terrorist Act remains unproven. Therefore, the 3rd count is also not proven.

On the last count of possession of Property for Commission of

Terrorist Acts, it was alleged that both accused persons were found in possession of one firearm, a submachine gun AK 47 with serial number NY 7120, on 14 August 2015 at Likawage village within Kilwa District in Lindi Region.

On this, there is no evidence at all that the 1st and 4th accused persons were found in possession of the firearm at Likawage Village.

PW4's evidence shows that the 3rd accused person was found with the firearm at Likawage Village. Further, in his evidence regarding the 2nd accused person, PW4 stated that he was the one who led them from Dar es Salaam to Likawage village.

On the other hand, PW5 stated that when they went to his home, he saw the second accused person handcuffed. He was with PW4, the street chairman, police officers, and militias.

When cross-examined by the counsel for the 4th accused person, PW5 responded that he saw him once when PW4 told him he was the 3rd accused person's sibling. PW5 did not tell the court where and when he saw the 3rd accused person.

In the information, it was alleged that the 2nd accused person was also found in possession of that firearm, but he was neither involved in the search and seizure nor signed the certificate of seizure, while PW4 testified

that he was the one who led them to Likawage Village. PW4, in his evidence, did not give reasons as to why the 2nd accused person, whom he said he led them from Dar es Salaam, did not witness the search and sign the certificate of seizure, and later charged him with the offence in connection to that weapon

The Court of Appeal in **Pascal Mwinuka vs. Republic**, Criminal Appeal No. 258 of 2019 (Tanzlii) held that;

> *"Similarly, in the present appeal, we think that the complaint of the appellant in his defence that the search was fabricated because* ***it was conducted in his absence*** *and the seized government trophies were not found in his house,* ***cannot be treated lightly"****.*
>
> **[Emphasis provided]**

Therefore, failure to include the 2nd accused person in the search and signing the certificate while PW4 stated that the 2nd accused was also at Likawage Village under their custody watered down the prosecution case against the 2nd accused person.

Regarding the 3rd accused person, the prosecution evidence was that he led PW4 to the place where the firearm was recovered. He also witnessed the search and signed the certificate.

As I alluded to earlier, in the 2nd sub-issue, the certificate is unreliable and was taken contrary to the law because the independent

witness who testified (PW5) was unreliable and not credible.

Therefore, the remaining evidence was uncorroborated oral evidence of PW4, which, in law, cannot prove the search and seizure without the certificate.

Therefore, the 4th count has also not been proven.

In their final submission, the prosecution side stated that considering the nature of offences facing the accused persons being serious in nature and attracting public interest at large and that since the terrorist-related offences involve a hidden and secret evil agenda, no one else rather than the accused themselves or their accomplices can be in good position to know and explain on how and when their evil intention was to be executed.

I entirely agree that terrorist-related offences are serious in nature and attract public interest. However, I don't agree that in terrorist-related offences, the burden of proof has now shifted from the prosecution side to the accused persons.

In the cited case of **Galus Kitaya** (Supra), the Court established a cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution.

Further, in **the D.P.P vs. Ngusa Kejela @ Mtangi and**

another, Criminal Appeal No. 276 of 2017, CAT (Tanzlii), it was held that, it is trite that the general duty of the accused person in criminal matters is only to raise doubt against the prosecution case and not otherwise.

Therefore, regardless of the nature of the offence (s), the prosecution has the duty of proving the case to the required standard, which is beyond a reasonable doubt in criminal cases.

In this case, it is my settled view that the prosecution side failed to prove the case beyond reasonable doubt while the accused persons successfully raised strong doubts against the prosecution case.

In the final analysis, the prosecution failed to prove the information preferred at the court in respect of both counts beyond a reasonable doubt because of the abovementioned reasons. Consequently, the information against accused persons in both counts is hereby dismissed.

As a result, the accused persons are acquitted and released forthwith from prison unless they are otherwise lawfully held.

It is so ordered.

K. D. MHINA
JUDGE
04/06/2024

Order

1. The firearm Sub Machine Gun AK 47 with serial No. NY 7120 be handed to the police force.

K. D. MHINA
JUDGE
04/06/2024

Court.

Right to appeal explained to the parties.

K. D. MHINA
JUDGE
04/06/2024